

Draft assessment framework for fibre deregulation review

16 February 2024

C H ● R U S

Introduction and summary

1. This is Chorus' response to the Commerce Commission's (**Commission**) consultation paper seeking feedback on the draft assessment framework for a reasonable grounds assessment for a Fibre Fixed Line Access Service (**FFLAS**) deregulation review.¹ No part of this submission is confidential.
2. There is overwhelming evidence that circumstances impacting the competitive environment have changed significantly and a deregulation review is warranted. The Commission is kaitiaki of the regulatory framework and good stewardship requires regular review of established settings to ensure they are optimally achieving their purposes.²
3. The Commission has acknowledged the importance of the deregulation review mechanism stating that it is a necessary and appropriate feature of Part 6, which recognises the dynamic nature of telecommunications markets.³ As this is the first time the Commission is undertaking a reasonable grounds assessment, it is important to establish a clear and predictable framework. The effectiveness of the review mechanism should not be compromised by taking an overly restrictive approach to assessing reasonable grounds. We **recommend**:
 - 3.1 While the delayed process for considering a review is unfortunate, it shouldn't preclude the Commission from undertaking a review. The implications of any changes need to be worked through sensibly and the process should be improved upon ahead of future regulatory periods.
 - 3.2 The Commission should broaden the focus on a change in circumstances to include other matters concerning the effectiveness of regulation at promoting the purpose statement.
 - 3.3 The proposed reference date for change in circumstances for the first reasonable grounds assessment should be 14 December 2016 as this was when the Cabinet agreed to implementation of the current regulatory settings.
 - 3.4 The Commission should take this opportunity to conduct appropriate analysis and establish clear market definitions. The adoption of FFLAS categorisation from the price-quality (**PQ**) and information disclosure (**ID**) determinations, and the use of the Ultra-Fast Broadband (**UFB**) initiative to create geographic reference areas, are poor substitutes.
4. We expand on our views in the following sections.

¹ Commerce Commission, *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act – Draft assessment framework paper*, 7 December 2023.

² See Commerce Commission, *Tauāki Whakamaunga Atu Statement of Intent 2023-2027*, 22 June 2023, p3 & p21

³ Commerce Commission, *Fibre Input Methodologies Main Final Reasons Paper*, 13 October 2020, para 2.182

Deregulation review process

5. We have previously submitted in response to the Commission's process and approach paper for the second regulatory period (**PQP2**) that the timing of the Commission's first deregulation review is problematic, and likely comes too late for PQP2.⁴
 - 5.1 The Commission will shortly release a draft decision on Chorus' expenditure proposal for PQP2. This exercise is predicated on applying PQ regulation to a particular scope of Chorus' FFLAS and any material change to the scope at this late stage, or any change taking effect during PQP2, would be disruptive and costly.
 - 5.2 In our submission we asked for clarification about how a review would affect the PQP2 path setting exercise. In the subsequent four months, however, the Commission has not provided clarification beyond saying "*We intend to respond to these submissions at a later date.*"⁵
6. This delay and uncertainty unfortunately detracts from the predictability of the regime and is inconsistent with the purpose of ensuring providers have incentives to invest and innovate.

Timing of review

7. The clear intention of the Telecommunications Act 2001 (**Act**) is for the Commission to consider the appropriate scope of FFLAS regulation ahead of each regulatory period so that any revised scope can take effect for the upcoming regulatory period. The legislation requires the Commission to consider deregulation "*before the start of each regulatory period*".
8. Our interpretation is also supported by the Cabinet papers through which the government set out the regulatory framework that was subsequently codified in new Part 6 of the Act. The Cabinet paper on Final Policy Decisions for Fixed Line Communications Services sets out that the Cabinet:⁶

Agree that the Commission regularly review whether competition has emerged for a service, market, asset or geographic location and deregulate regulated suppliers accordingly. This review is to be done prior to each regulatory period (except the first).

9. The scope of FFLAS regulation for an upcoming regulatory period is as fundamental to the PQ path setting exercise as the length of the regulatory period. The Commission issued a draft decision on the length of PQP2 in December 2022 and a final decision in February 2023. This allowed Chorus to incorporate the length of PQP2 into its PQ proposal. In contrast, similar certainty was not provided on the scope of regulation, which should have been provided equally in advance.

⁴ Chorus, *Submission on the Process and approach paper for the 2025-2028 regulatory period*, 28 September 2023, para 137-140

⁵ Commerce Commission, *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act – Draft assessment framework paper*, 7 December 2023, para 5.22

⁶ Available here: <https://www.mbie.govt.nz/dmsdocument/1118-review-telecommunications-act-2001-final-policy-decision-cabinet-paper-pdf>

Moving forward

10. This delay should not, however, prevent the Commission carrying out a review, since there is overwhelming evidence that circumstances have changed significantly and a deregulation review is warranted (see below).
11. We suggest the practical implementation and implications of any change(s) identified as desirable in a review be considered as part of that review process. The object should be to accommodate any changes in a way that best gives effect to the purpose of the regulation and minimises disruption and costs. We note there may be changes that could be made without necessarily affecting the PQP2 path setting exercise, such as changes to the scope and application of ID regulation.
12. We expect the Commission to carry-out future deregulation review processes well in advance of subsequent regulatory periods to provide certainty as to the scope of regulation prior to the relevant PQ path setting exercise and ensure sufficient time for any changes to be implemented.

Framework for assessment

13. The Commission's draft assessment framework largely follows the approach to considering whether there are reasonable grounds to review regulation of designated and specified services under Schedule 3 of the Act. This is a useful starting point, but the context and framework of Part 6 are different and the Commission should depart from the Schedule 3 approach where appropriate.
14. We recommend that the Commission:
 - 14.1 Adopt a low threshold for finding that reasonable grounds to review exist;
 - 14.2 Not limit their inquiry to evidence of a change in circumstances. Rather the Commission should also consider other evidence that the current application of PQ and ID regulation may not be effectively achieving the purposes of Part 6; and
 - 14.3 Use a more appropriate reference date when considering whether there has been a change in circumstances.

Threshold to carry out a review

15. In our view the threshold for finding reasonable grounds to commence a deregulation review should be low. Regular reviews of regulatory settings are a core part of good regulatory stewardship and it is not consistent with this to avoid reviews through setting a high bar for 'reasonable grounds'.
16. The Commission states that reasonable grounds to investigate whether a FFLAS should be deregulated exist where there is evidence that circumstances may have changed to such an extent that continued regulation, or the regulation in its current

form, is no longer necessary to best promote the long-term benefit of end-users in markets for FFLAS.⁷

17. In our view assessment of the extent of any change, and whether it calls into question the effectiveness of current regulatory settings, is work that should be undertaken as part of deregulation review itself, rather than during the reasonable grounds assessment. Instead, we recommend an approach based on what the Commission says later in the draft framework paper: that the Commission is interested in evidence of “*the emergence or expansion of alternative networks offering services that may represent a competitive constraint of services that are offered using FFLAS*”⁸. The threshold for reasonable grounds should be satisfied if it can be shown that there has been an increase in competition that may constrain FFLAS or services offered using FFLAS.
18. We also recommend that the Commission not limit itself to considering change in circumstances that may constrain FFLAS. It should also consider other matters which might provide reasonable grounds for review.

Focus on change in circumstances

19. We believe a focus on change in circumstances is too narrow and the Commission should look more broadly at whether there are reasonable grounds for a review under section 210.
20. This is a new framework and a deregulation review now would be the first time FFLAS regulation has been considered since its detailed design and implementation. Declining to review a novel framework solely on the basis of a view about change in circumstances would be at odds with good regulatory stewardship.

A Schedule 3 approach is too restrictive

21. Focusing on change in circumstances adopts the approach used for considering whether there are reasonable grounds to review regulation of a designated or specified service under Schedule 3. However, there are important differences between the reviews under section 210 and reviews under Schedule 3 which mean the Commission’s proposal to focus on a change in circumstances is too narrow. Specifically:
 - 21.1 **Different purposes require different considerations** - the purpose of Part 2 of the Act arguably permits a narrow focus on the change in circumstances and how these may have impacted competition, whereas the different purpose of Part 6 requires a broader inquiry as to ‘reasonable grounds’ in order to make the decision which best gives, or is likely to best give, effect to section 162, and to the extent relevant, to the promotion of workable competition in telecommunications markets.⁹
 - 21.2 **Section 210(4) requires a broader ‘reasonable grounds’ inquiry** – The matters a review under section 210 may consider are specified in section 210(4). There is no equivalent provision for a review under Schedule 3.

⁷ Commerce Commission, *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act – Draft assessment framework paper*, 7 December 2023, para 2.11

⁸ Ibid at 5.5

⁹ As required by s166 of the Act

- 21.2a Change in circumstances is relevant to considering the matters set out in sections 210(4)(a) and (b) – specifically, whether competition and the ability to exercise market power has increased or decreased.
- 21.2b However, change in circumstances does not adequately address the matter described in section 210(4)(c) – whether the purpose of Part 6 would be better met if one or more FFLAS were no longer regulated or no longer subject to PQ regulation. Relying solely on change in circumstances to decide whether to ask the question in section 210(4)(c) assumes the framework was optimally meeting the purposes of Part 6 at the start of the reference period. Part 6 is new framework with bespoke features that were untested prior to implementation. An assumption that this framework was optimal at inception is simply not defensible. Therefore, a broader inquiry as to reasonable grounds for review is required.

Broadening the focus

- 22. In addition to considering whether there is evidence of a change in circumstances, the Commission should consider the following in determining whether there are reasonable grounds to conduct a deregulation review:
 - 22.1 Evidence indicating the cost of regulation of any FFLAS may exceed the benefits. Key to the framework is that costs imposed on regulated providers are passed-on to consumers via pricing. Consumers would be better served if regulation, where costs exceed benefits, were removed. We acknowledge the Commission does mention potentially considering costs and benefits of deregulation in its draft framework,¹⁰ but this consideration is fundamental and should be a key focus of the assessment.
 - 22.2 Any other evidence indicating the purposes of Part 6 would be better met if regulation were altered. Such evidence doesn't only arise by a change in circumstances, rather it could be anything that calls into question the effectiveness of any part of the current regulation at achieving its purpose.

Reference date for change in circumstances

- 23. While a broader inquiry is needed, we agree that change in circumstances is a relevant factor in assessing whether there are reasonable grounds to conduct a deregulation review. The Commission has proposed to use 1 January 2022 (the new fibre regime implementation date)¹¹ as the reference date for assessing whether there may have been a change in circumstances. We disagree that this is the appropriate date.
- 24. The reference date for assessing change in circumstances should be set at the last time the market was assessed, and the regulatory settings were considered. Since there was no assessment of the market by the Commission prior to implementation of the current framework, the appropriate reference date would be when the Cabinet agreed to implementation of the current settings.
- 25. There were a number of Cabinet discussions and decisions regarding the new regulatory framework, but we believe the most appropriate reference date is when

¹⁰ Commerce Commission, *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act – Draft assessment framework paper*, 7 December 2023, para 2.34

¹¹ *Ibid* at 2.13

Cabinet made the 'final policy decisions' as to the regulatory framework that was codified in new Part 6 of the Act. Those decisions were made on 14 December 2016.¹²

26. We think the very latest date that could credibly be used as a reference date is the date of the current regulations under section 226 of the Act – 18 November 2019.¹³ There can be no argument that any consideration has been given to the application of PQ and ID regulation after that date. However, we think that 14 December 2016 remains the more appropriate date for comparison. That was the date on which the final policy decisions were taken about the application of PQ and ID and subsequent processes are better characterised as implementation of this decision.

Market definition

27. Sections 210(4)(a) and (b) involve a competition assessment which necessarily involves market definition. It is fundamental that the Commission should undertake suitable analysis to understand the market and propose appropriate market definitions when considering reasonable grounds to review.
28. We have particular issues with the following aspects of the Commission's proposal in relation to service definition and geographic area:
- 28.1 Use of the UFB construct to define the geographic market;
 - 28.2 Use of FFLAS categorisation to define the service; and
 - 28.3 Consideration of markets at a point in time rather than taking account of foreseeable changes.
29. The Commission has also noted it will consider wholesale level and retail markets.¹⁴ We believe the Commission should focus on wholesale markets since Chorus and the other UFB local fibre companies (**LFCs**) are prevented from directly operating in retail markets. However, since reasonable grounds only need to be shown in "*a relevant market*" the focus at this stage should not affect the decision on whether to hold a review.

Geographic definition

30. The Commission proposes an approach to geographic definition that is underpinned by the UFB construct. This results in the Commission considering Chorus PQ, Chorus ID only, and LFC areas as the relevant geographic areas. We do not agree this is the correct way to define geographic reference areas.
31. As the Commission notes, while the majority of the fibre network was built pursuant to the UFB contracts, some of that infrastructure has been built independently of the UFB initiative in areas where another LFC secured the UFB contract.¹⁵ Not only is it foreseeable that Chorus may continue to construct further fibre infrastructure in those

¹² [1117-review-telecommunications-act-2001-final-policy-decision-cabinet-minute-pdf \(mbie.govt.nz\)](#)

¹³ Telecommunications (Regulated Fibre Service Providers) Regulations 2019

¹⁴ Commerce Commission, *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act – Draft assessment framework paper*, 7 December 2023, para 2.28

¹⁵ *Ibid* at 4.5

areas, but other LFCs may also construct their networks outside their UFB footprint. LFCs have also acquired significant non-UFB networks.¹⁶

32. This is evidence that relying on the UFB construct as a reference point for defining the geographic market is no longer relevant and will become even less relevant over time. Given the UFB initiative has been completed and there is now UFB and non-UFB LFC fibre, the distinction and associated boundaries has become increasingly complicated. The UFB construct is meaningless from a market definition perspective, because where network growth occurs and new technology is deployed is not going to be determined by a fibre-only construct used to roll out the initial broadband network.
33. The Commission needs to undertake analysis to define the geographic market to understand how the New Zealand broadband market varies by geographic region as some areas may face materially different levels of competition. For example, Ofcom analyses competition at each postcode to define geographic markets, in which competitive conditions are sufficiently similar to enable them to be grouped together as one geographic market.¹⁷

Service defined by FFLAS categorisation

34. The Commission has used FFLAS categorisation as its starting point for considering service market definition. FFLAS categorisation is a useful structure for practically applying PQ and ID regulation, and this is the purpose for which it was constructed. But it is a poor substitute for proper service market definition.
35. There are a number of important questions about the boundaries of service markets in the telecommunications sector which this assessment could address such as whether there should be a single market for all speeds or a separate low-and-high-speed market. For example, one FFLAS category is 'Bitstream PON services'. This includes our Home Fibre Starter service providing 50Mbps downstream and 10Mbps upstream. The same category also includes our Home Hyperfibre 8000 service providing 8000Mbps downstream and upstream.
36. Following the identification of the market boundaries, it can be determined which technologies and services are in the relevant market and the extent of the constraints they place on the regulated service.

Accounting for dynamic markets

37. The Commission's proposed framework takes a short-term view and focuses solely on current networks. However, given the telecommunications market is dynamic, any market definition needs to be carried out with consideration of:
 - 37.1 Planned and foreseeable network developments (e.g. 5G networks) on the geographic footprint; and
 - 37.2 How the defined market will likely change over time e.g. with the entry and adoption of new technologies.

¹⁶ See: <https://www.tuatahifibre.co.nz/articles/tuatahi-first-fibre-completes-acquisition-of-unison-fibre-limited>

¹⁷ Ofcom, *Wholesale Fixed Telecoms Market Review*, 31 March 2021, p119.

38. The Commission should consider how markets are likely to change within the period until the next consideration of whether there are reasonable grounds to commence a deregulation review – i.e. within the duration of the next regulatory period (PQP2).

Evidence for reasonable grounds

39. We are aware that actual consideration of whether reasonable grounds exist is out of scope of this consultation. However, for completeness, we note there is overwhelming evidence indicating a deregulation review is warranted to assess the effectiveness of the current regulatory settings. This is true even applying the Commission's draft framework focusing on change in circumstances since 1 January 2022 (which is too narrow).
40. For example, a review may consider (amongst other things) whether competition to one or more FFLAS has increased or decreased in the relevant market.¹⁸ It is clear that the landscape for fixed line telecommunications has changed significantly even since early 2022, and competition to Chorus and LFCs is increasing, for reasons including:
- 40.1 RSP consolidation including acquisition by mobile network operators of dedicated fixed-line RSPs (e.g. 2Degrees acquisition of Vocus);
 - 40.2 4G FWA expansion across the country;
 - 40.3 5G FWA introduction – supported by spectrum allocation;
 - 40.4 Entry of LEO Satellite services;
 - 40.5 Increasing fibre deployments by non-LFCs and removal of geographic fibre-building restrictions for non-Chorus LFCs; and
 - 40.6 Copper retreat and impending retirement at a faster rate than previously thought.

¹⁸ Commerce Commission, *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act – Draft assessment framework paper*, 7 December 2023, at 2.12